

# United States Senate

300 ALA MOANA BOULEVARD  
ROOM 7-212  
HONOLULU, HI 96850  
(808) 523-2061

November 9, 2018

The Honorable Jay Clayton  
Chairman  
Securities and Exchange Commission  
100 F Street, NE  
Washington, DC 20549

Dear Chairman Clayton:

I am writing to submit a comment to the SEC in light of its forthcoming roundtable on the proxy process, File Number 4-725. Specifically, I am concerned that Staff Legal Bulletin No. 14J marks a policy shift in how the SEC treats shareholder proposals in general, and proposals related to climate change in particular, without going through a rulemaking process or receiving congressional approval.<sup>1</sup> This shift appears to have started before Staff Legal Bulletin No. 14J was published, as the SEC increased its use of the “micromanagement” exclusion, especially with respect to climate change-related proposals. This bulletin—and the new policy it reflects—will undermine the rights of shareholders to engage with publicly traded companies on issues that are essential to risk management, strong governance, and long-term value creation, such as the impact of climate change on companies and companies’ impact on climate change. As the SEC reviews the proxy process in its upcoming roundtable, I urge you rescind the Staff Legal Bulletin No. 14J and reverse the SEC’s policy of expanding the use of the micromanagement exclusion.

### ***Growing Investor Interest in Managing Climate Risk***

Investors have a financial interest in companies’ management of climate change-related risks, particularly companies in oil and gas industries. As SEC guidance states, investors have a right to clear disclosure of climate-related risks so that they can understand the full scope of material risks to which their portfolios are exposed.<sup>2</sup> Similar sentiments have been expressed by leading business scholars,<sup>3</sup> regulators in other countries,<sup>4</sup> and investors themselves.<sup>5</sup> Investors have a

---

<sup>1</sup> “Shareholder Proposals: Staff Legal Bulletin No. 14J (CF)” (Division of Corporation Finance, Securities and Exchange Commission, October 23, 2018), <https://www.sec.gov/corpfin/staff-legal-bulletin-14j-shareholder-proposals>.

<sup>2</sup> “Commission Guidance Regarding Disclosure Related to Climate Change” (Securities and Exchange Commission, February 8, 2010), <https://www.sec.gov/rules/interp/2010/33-9106.pdf>.

<sup>3</sup> See, e.g., Matthew E. Kahn, “Requiring Companies to Disclose Climate Risks Helps Everyone,” *Harvard Business Review*, February 16, 2017, <https://hbr.org/2017/02/requiring-companies-to-disclose-climate-risks-helps-everyone>.

<sup>4</sup> See, e.g., Iain Withers, “Just One in 10 Banks Preparing for Climate Change Risk, Warns Bank of England,” *The Telegraph*, September 26, 2018, 10, <https://www.telegraph.co.uk/business/2018/09/26/just-one-10-banks-preparing-climate-change-risk-warns-bank-england/>.

<sup>5</sup> See, e.g., Amy Harder, “Wall Street Is Starting to Care about Climate Change,” *Axios*, June 26, 2017, <https://wwwaxios.com/wall-street-is-starting-to-care-about-climate-change-1513303205-f97cf14c-c921-4ad0-b37a-12832acea4fb.html>; Todd Cort and James Stacey, “Investors Push the Pace of Climate Risk Financial Disclosures” (Yale Center for Business and the Environment & ERM, May 2018),

right to use shareholder proposals to require companies to take actions to mitigate the material risks of climate change in their investment portfolios, increase their financial stability, and to act in interest of the public.

While such proposals are not new, the number of shareholder proposals about climate change has increased in recent years. Since at least 1990, investors have filed numerous climate change-related shareholder proposals.<sup>6</sup> The growing number of shareholder proposals asking companies to take action is evidence that investors increasingly realize the risks climate change poses for businesses. Investors filed fewer than 10 climate change-related shareholder proposals in 2000,<sup>7</sup> over 25 in 2005,<sup>8</sup> over 40 in 2007,<sup>9</sup> over 60 in 2015,<sup>10</sup> and already over 70 this year, as of July 12, 2018.<sup>11</sup>

Shareholder support for climate change proposals has also increased over time. The average climate change-related shareholder proposal received 32.8% of shareholder support in 2017,<sup>12</sup> up significantly from an average of 21.6% in 2007.<sup>13</sup> The 18 proposals in 2017 that specifically seek a company to undertake a risk assessment under the two-degree Celsius scenario proposed in the *Paris Agreement* received an average of 45% support, up from eight proposals averaging 32% in 2016.<sup>14</sup> Most significantly, last year marked an important milestone for climate change-related shareholder proposals because proposals at three companies—Exxon Mobil Corp., Occidental Petroleum Corp., and PPL Corp.—were successful in garnering majority support from shareholders for climate change disclosure, including from BlackRock and Vanguard Inc., the first and second largest asset managers, respectively, by assets under management.<sup>15</sup>

### ***Change in the SEC’s Use of “Micromanagement” Exclusion***

I am concerned that the SEC has made a significant change in how it applies the law to make it easier for companies to exclude shareholder proposals. It made this change without going through a formal rulemaking process, which denies stakeholders the opportunity to comment on the change. Starting in 2017, the SEC has demonstrated a greater willingness to accept companies’ arguments for excluding shareholder proposals on micromanagement grounds. This shift began well before the publication of Staff Legal Bulletin No. 14J. The SEC allowed the

---

<sup>6</sup> <https://www.erm.com/globalassets/documents/publications/2018/yalecbe-erm-investors-push-the-pace-on-climate-risk-financial-disclosures.pdf>.

<sup>7</sup> Elise N. Rindfleisch, “Shareholder Proposals: A Catalyst for Climate Change-Related Disclosure, Analysis, and Action,” *Berkeley Business Law Journal* 5, no. 1 (March 2008), <https://doi.org/10.15779/z386003>.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> “Investors Continue Focus on Climate Change in the Wake of Paris Accord” (Institutional Shareholder Service, December 18, 2015), <https://www.issgovernance.com/investors-continue-focus-climate-change-wake-paris-accord/>.

<sup>11</sup> Ronald O. Mueller et al., “Shareholder Proposal Developments during The 2018 Proxy Season” (Gibson, Dunn & Crutcher LLP, July 12, 2018), <https://www.gibsondunn.com/wp-content/uploads/2018/07/shareholder-proposal-developments-during-the-2018-proxy-season.pdf>.

<sup>12</sup> Ronald O. Mueller et al.

<sup>13</sup> Rindfleisch.

<sup>14</sup> Mara Lemos Stein, “More Shareholder Proposals Spotlight Climate Change,” *Wall Street Journal*, February 8, 2018, <https://blogs.wsj.com/riskandcompliance/2018/02/08/more-shareholder-proposals-spotlight-climate-change/>.

<sup>15</sup> Amy Harder, “Wall Street Is Starting to Care about Climate Change”; Liam Kennedy, “Top 400 Asset Managers 2018: 10 Years of Asset Growth,” *ipe*, June 2018, [www.ipe.com/reports/special-reports/top-400-asset-managers/top-400-asset-managers-2018-10-years-of-asset-growth/10025004.fullarticle](http://www.ipe.com/reports/special-reports/top-400-asset-managers/top-400-asset-managers-2018-10-years-of-asset-growth/10025004.fullarticle).

exclusions of 4 proposals on micromanagement grounds in 2017, and 11 proposals in 2018, both of which mark a significant increase from relatively rare use of micromanagement as a grounds for no-action letters in previous years.<sup>16</sup>

The more expansive application of the micromanagement exclusion appears to be targeted at climate change proposals in particular. GHG emissions proposals were the most common type of proposal excluded on micromanagement grounds in both 2017 and 2018,<sup>17</sup> even though prior SEC decisions state that climate change and greenhouse gas emissions proposals transcend ordinary business and qualify as significant policy issues concerning shareholders.<sup>18</sup>

For example, in the case of EOG Resources, one of the largest independent oil and gas companies in the United States, the Division of Corporation Finance agreed with management that the proposal could be excluded under rule 14a-8(i)(7), which permits the exclusion of a proposal that “micromanages” the company.<sup>19</sup> It was not clear why the Division of Corporation Finance would conclude that the climate change proposal EOG Resources sought to exclude constitutes micromanagement when other similar proposals have not been excluded for this reason in the past. Importantly, the shareholder proposal at issue did not dictate the terms of the GHG emission reduction targets, nor how or when EOG Resources should achieve those targets. Instead, the proposal simply would have required the company to “adopt company-wide, quantitative, time-bound targets” for reducing GHG emissions because, as shareholders, they see compelling economic and social reasons to reduce GHG emissions.<sup>20</sup>

In addition to the EOG Resources no-action letter this season, the SEC concurred with both Apple Inc. and Deere & Co. about the exclusion of shareholder proposals on emissions reductions on the basis of micromanagement.<sup>21</sup> In both cases, the shareholder proposal requested a report evaluating the potential to achieve net-zero emissions of greenhouse gases by a fixed future date. The SEC also concurred with the exclusion of a proposal submitted to PayPal Holdings, Inc. this year that was nearly identical to a proposal the SEC allowed to proceed last year.<sup>22</sup> Neither proposal required the achievement of net-zero emissions or even suggested the future date for achieving net-zero emissions; they simply asked the company to provide a report on the feasibility of achieving net-zero emissions in the future.

### ***SEC Staff Legal Bulletin No. 14J***

The publishing of SEC Staff Legal Bulletin No. 14J on October 23, 2018 appears to formalize this shift in SEC policy about shareholder proposals rather than simply clarifying the application

---

<sup>16</sup> Ronald O. Mueller et al.

<sup>17</sup> Ronald O. Mueller et al.

<sup>18</sup> See, e.g., *CBS Corporation* (Securities and Exchange Commission March 1, 2016); *Great Plains Energy Incorporated* (Securities and Exchange Commission February 5, 2015).

<sup>19</sup> *EOG Resources, Inc.* (Securities and Exchange Commission March 12, 2018).

<https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2018/trilliummillerrecon031218-14a8.pdf>

<sup>20</sup> *EOG Resources, Inc.*

<sup>21</sup> *Apple Inc.* (Securities and Exchange Commission December 21, 2017); *Deere & Company* (Securities and Exchange Commission December 27, 2017). <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2017/jantzmanagement122117-14a8.pdf>.

<sup>22</sup> *PayPal Holdings, Inc.* (Securities and Exchange Commission March 6, 2018); *PayPal Holdings, Inc.* (Securities and Exchange Commission March 13, 2017).

of Rule 14a-8(i)(7). I am troubled both by the process by which this shift was decided and by the apparent targeting of climate change proposals.

By formalizing the policy shift seen over the past two years in a staff legal bulletin, the SEC has avoided going through a rulemaking process or receiving explicit congressional authorization. This approach has prevented Congress, stakeholders, and the public from having any input into the policy. The Staff Legal Bulletin No. 14J also seems to specifically target climate change related proposals, citing multiple climate change-related proposals in its analysis of the micromanagement consideration with respect to rule 14a-8(i)(7). If the SEC is now going to presume that proposals that ask companies to set targets for carbon emissions are micromanagement, the SEC will significantly undermine shareholders' rights to protect their investments and leaves markets more vulnerable to the risks posed by climate change.

The SEC's recent actions against climate change-related shareholder proposals and its apparent policy shift marked by Staff Legal Bulletin No. 14J weaken an important aspect of a well-functioning, mature market, in which shareholders operating on longer-term time horizons can influence companies' managements that may have shorter-term outlooks and incentives. I urge you to bolster, not weaken, investors' abilities to engage with companies on important issues, such as climate change, by reversing Staff Legal Bulletin No. 14J and the policy shift it reflects.

Sincerely,

A handwritten signature in blue ink, appearing to read "Brian Schatz".

BRIAN SCHATZ  
U.S. Senator